No. 92-1477

In The

Supreme Court of the United States

October Term, 1992

MISSOURI PACIFIC RAILROAD COMPANY,

Petitioner,

vs.

DONALD R. CONANT,

Respondent.

On Petition for Writ of Certiorari To The Court Of Appeals For The Fourth Court Of Appeals District Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent respectfully disagrees with Petitioner's statement of the question presented and suggests that the issue is more properly formulated as follows, *viz:*

> Whether the Texas courts' holding that the failure to instruct the jury to discount future lost wages to their "present-value," in a case under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §51 et seq. is "reversible error" where (i) the only evidence was that the *already discounted* future earnings lost as a result of Respondent's injury were $838,000; (ii) the jury applied its own "discount" of almost 70% to arrive at a reduced award of $255,000; and (iii) a federal court applying the equivalent principles of law under 28 U.S.C. §2111 (1982) and Fed. R. Civ. P. 61 would have reached the same conclusion as the Texas courts in application of the "harmless error" rule.

CERTIFICATE OF PARTIES

In order that members of the Court may determine disqualification or recusal pursuant to Sup. Ct. R. 29, Respondent certifies that the following is a complete list of the parties and counsel interested in the outcome of this case:

Name/address of this party:	**Position in the trial court:**	**Counsel for this party:**
Donald R. Conant, Respondent 9214 Valley Haven San Antonio, Texas	Plaintiff	Bernard Fischman *Counsel of Record* Richard Tinsman Tinsman & Houser, Inc., 700 N. St. Mary's Street 1400 One Riverwalk Place San Antonio, Texas 78205
Missouri Pacific Railroad Co., a subsidiary of Union Pacific Railroad Company, Petitioner 801 Travis Street, Suite 1600 Houston, Texas	Defendant	Lori Meghan Gallagher Counsel of Record Kathleen E. Fenwick Andrews & Kurth, LLP 4200 Texas Commerce Tower Houston, Texas 77002

In this brief, Respondent will sometimes refer to the parties by their respective positions in the trial court or by the terms "Conant" and "Railroad."

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JURISDICTION

Respondent agrees that the Supreme Court of the United States has jurisdiction of this case under 28 U.S.C. §1257(a) (Supp. 1992).

STATEMENT OF THE CASE

A. Procedural History of the Case

This is a case under the Federal Employer's Liability Act ("FELA") 45 U.S.C. §51, et seq. in a court of the State of Texas. Plaintiff, Donald R. Conant, a 17-year employee of the Railroad, suffered a debilitating back injury while attempting to climb the ladder onto his locomotive in the early morning hours of January 26, 1989. The jury found the Railroad was negligent in permitting Conant to return to work as an engineer despite the information known to the Railroad's own medical director that Conant's prior knee injury made it clearly unsafe for him to be climbing ladders on locomotives (Tr. 26).[1]

Judgment awarding total compensation for Conant's damages in the amount of $884,103.00 was signed January 28, 1991 (Tr. 34). The Railroad's motion for new trial (Tr. 35) was overruled by order signed March 12, 1991 (Tr.

[1] In this brief, Respondent will refer to the court record using the customary references found in Texas' appellate court procedure. Thus, the designation of "Transcript" (abbreviated "Tr.") refers to the trial court pleadings, verdict and judgment. The designation "Statement of Facts" (abbreviated "SF") refers to the official record of testimony from the trial court. The term "Px" refers to Plaintiff's exhibits at trial.

38). The Railroad timely perfected appeal and superseded the judgment (Tr. 41). By opinion and judgment filed April 30, 1992, the Court of Appeals for the Fourth District of Texas affirmed the trial court's judgment. The opinion of the Court of Appeals correctly states the nature and result of the case. The Railroad's motion for rehearing in the Court of Appeals was overruled on July 8, 1992.

On November 11, 1992, the Texas Supreme Court denied the Railroad's petition for discretionary review by writ of error to the Court of Appeals. Petitioner's motion for rehearing in the Texas Supreme Court was denied on December 16, 1992.[2]

B. Evidence that Respondent's Lost Earnings were Discounted to Present Value

In support of his claim for lost wages, both past and future, Plaintiff offered the testimony of Dr. Everett Dillman, Ph.D., an economist and former university professor in business administration. Without contradiction, Dr. Dillman calculated the earnings and the value of fringe benefits that Conant would have enjoyed had his railroad career continued. Using Conant's last full year of

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[2] On October 1, 1990, Conant filed bankruptcy in the United States District Court for the Western District of Texas, San Antonio Division. On January 20, 1993, the Court of Appeals denied the Railroad's request for a stay of enforcement of the judgment pending the present petition for certiorari. The judgment was paid in full, on February 2, 1993. The parties have stipulated that payment of the judgment would not be considered a ground for denial of the writ of certiorari.

employment (1988) as a base, Dr. Dillman concluded that Conant's annual earnings and benefits would have been worth approximately $72,500.00 (SF 512). Factoring in deductions for income taxes and projected offsetting wages Conant could earn at his substitute job delivering pizza, the expert pegged the present value of lifetime lost earnings at approximately $1,091,000.00 (SF 523). From this projected amount he made allowances for the possibility that Conant could, at some point, return to school, complete his education and within a few years begin earning about one-half of what he had been making as a railroad engineer (SF 524-26). Professor Dillman also made allowances for the effects of inflation versus a present value for the future stream of income, concluding that the pluses and minuses would offset one another (SF 520-21; 547-49). From a "best case" scenario in which Conant does, in fact, obtain a college degree and regain a portion of his earning power over a period of years, *he still has a projected lifetime income loss of approximately $838,000.00 measured at present value* (SF 527; Px 17). Of that total, the jury awarded only $87,000.00 for past lost wages and $255,000.00 in future lost earnings (Tr. 29).

C. Preservation of the Federal Question

The Railroad's statements concerning the manner in which the federal question was presented to the trial court are somewhat misleading (Petition, pp. 3-4). While the Railroad did tender a present value instruction (Request No. VIII, Tr. 17), its proposed instruction was affirmatively incorrect in instructing the jury to discount not only the future earnings, but also future physical pain and mental anguish as well. This Court's holding in *St.*

Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409 (1985), requires discounting of "pecuniary benefits" only, citing *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 491 (1916). The instruction proffered by the Railroad went beyond that required by *Dickerson* and *Kelly*. *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 886 (8th Cir. 1980) *cert. denied*, 450 U.S. 921 (1981).

Under Texas' procedural rules, not only must a tendered instruction be substantially correct, it must not be affirmatively *in*correct. *Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987); Tex. R. Civ. P. 278.[3] Thus, when Conant's counsel objected to the Railroad's proposed instruction, his observation that there is no case law requiring reduction of physical pain and mental anguish to their present value (SF 1038) was correct. *Texas & Pac. Ry. v. Buckles*, 232 F.2d 257, 264 (5th Cir. 1956).

The further observation that Plaintiff's counsel "persuaded the court that it did not need any instruction on present value" is likewise somewhat misleading. Counsel's comment (SF 1047) came in the context of the discussion regarding inflation as a factor to consider in assessing damages. The court had observed correctly " . . . inflation is a factor of the present value." (SF 1046) Conant's counsel agreed and suggested that, given the state of the evidence the instruction was unneeded. In the

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[3] In relevant part, that rule provides: "Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment."

final jury charge, both the inflation and nontaxability instructions were given (Tr. 28).

REASONS FOR DENYING THE PETITION

The trial court's failure to instruct the jury on present value was harmless error because:

A. Plaintiff's expert did, in fact, discount the future earnings to their present value and the jury awarded much less than the discounted amount.

The Railroad correctly says that the court's instructions preceding the jury question regarding Plaintiff's damages failed to advise the jury to discount to its "present value" the amount of Conant's future earnings lost by reason of his injury. *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985). Plaintiff's expert, Dr. Everett Dillman, did, however, make just such an adjustment in determining the value of the future stream of lost wages (SF 516-18). The issue is whether the Railroad has shown that the trial court's failure to instruct on present value was an error which, in reasonable probability, caused the rendition of an improper verdict. Plaintiff believes that the Court of Appeals held correctly that the Railroad did not meet that burden.

In *Southern Pac. Trans. Co. v. Hernandez*, 804 S.W.2d 557, 561 (Tex. App. – San Antonio 1990, writ denied), *cert. denied*, 112 S.Ct. 406 (1991) the trial court refused to include in the jury charge an instruction informing the jury that FELA awards are not taxable. In order that the

damages awarded in FELA cases should more closely reflect their fair value, *Dickerson* requires a present value instruction. To the same end, the case of *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), *reh'g. denied*, 445 U.S. 972 (1980), holds that the refusal to submit a non-taxability instruction is error. Yet, the *Hernandez* court held, notwithstanding the *Liepelt* decision, that the trial court's failure so to instruct was harmless error under Tex. R. App. P. 81(b). *Hernandez, supra*, 804 S.W.2d at 561.

The Railroad both criticizes the Texas court's reliance on its own precedent and attempts to distinguish the result in *Hernandez*, arguing that under *Liepelt*, the non-taxability instruction is *not always* required but that under *Dickerson*, a present value instruction *always is* required. The purported distinction is illusory. In terms of the effect on a jury's decision-making process and the amount of any FELA award, the impact of taxation on the calculation of damages is likely to be a much greater factor in reducing the award than the more difficult to apply concept of discounting to present value. Certainly, the two concepts are at least qualitatively the same, if not equal in their impact.

Failing to distinguish *Hernandez*, the Railroad alternatively argues that *Hernandez* is incorrect and places the Texas courts at odds with the federal courts which have addressed the issue. The Railroad relies on *Beanland v. Chicago, Rock Island & Pac. R.R.*, 480 F.2d 109, 111, 114-15 (8th Cir. 1973) and *Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 377 (5th Cir. 1989), which say that failure to give the present value instruction is error, regardless of the reason for its omission from the charge.

Although the *Colburn* court found that the omission of the present value instruction was plain error, even in the absence of the towing company's objection, the matter does not end there. There was compound error in the case. The *Colburn* court was also concerned with a "unit of time" argument made by plaintiff's counsel during his summation. Following the initial jury instructions, the trial judge invited counsel to object to the charge. The towing company did object to the "unit of time" argument and tendered a proposed cautionary instruction which the trial judge refused. 883 F.2d at 376. Noting that even in the absence of objection "we *may* still reverse for plain error," 883 F.2d at 377 (emphasis added), the *Colburn* court proceeded "to consider the instructions as a whole, the evidence presented and the arguments of counsel." *Id.* The court stated:

> Reversible error exists when this court has a 'substantial and ineradicable doubt as to whether or not the jury has been properly guided in its deliberations.' *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 425 (5th Cir. 1985). Here, we have such doubt. Allowing a 'unit of time' argument without a specific cautionary instruction *and* failure to instruct the jury on present value *could have had* a considerable effect on the amount of the jury verdict. We therefore vacate the $450,000 damage award.

883 F.2d at 377-78 (emphasis added).[4]

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[4] Indeed, the Fifth Circuit has held that while it may reverse for plain error in an instruction to which no objection was made, *Chagas v. Berry*, 369 F.2d 637, 641 (5th Cir. 1966), *cert. denied*, 389 U.S. 872 (1967), that power will be exercised only in

Beanland was encumbered with similar compound errors. There, the injured plaintiff's verdict was contaminated with evidence of his distress at witnessing the death of his co-worker who was killed in the same accident. Further, there was evidence pertaining to the plaintiff's wrongful discharge, an intentional act, the evidence of which "[had] no place in a personal injury FELA action which deals exclusively with *negligence.*" 480 F.2d at 113. Additionally, the railroad was erroneously precluded from introducing expert testimony to answer the plaintiff's claims regarding certain railroad operating rules. *Id.* at 116. The compound effect of these errors was sufficient to warrant a new trial. It is interesting to note that a concurring judge agreed with the court's holding on the present value instruction, but suggested that ". . . fairness to the plaintiff requires consideration of likely increases in future earnings attributable to offsetting inflationary trends in the economy." *Id.* at 116-117 (Bright, Circuit Judge, concurring).

The significance is this: Even where there is "plain error," the reviewing court is not required to reverse *unless* there is raised such a degree of doubt, that the verdict unmistakably must have resulted from the misguidance of the instructions. Thus, even under *Colburn*, there is no automatic mandate for reversal. It is the totality of the evidence, argument and instructions which tell the story. In this case, the Texas Court of Appeals' decision took all those factors into account and concluded that, on the totality of the record, the error was harmless.

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exceptional cases. *Delancey v. Motichek Towing Serv., Inc.*, 427 F.2d 897, 901 (5th Cir. 1970).

Colburn does not support the Railroad's contention that the Fifth Circuit would have found differently under its own standard. *Colburn* does not support the Railroad's conclusion that this case and the earlier decision in *Hernandez* place the Texas courts at odds with the Fifth Circuit and this Court's own precedents.

Thus, the real focus should be not on an artificial distinction between *Liepelt* and *Dickerson*, but rather, on whether the facts of this case establish that omitting the instruction caused the rendition of an unjust verdict.[5] A review of Dr. Dillman's present value testimony shows that the Court of Appeals was correct in its conclusion. In explaining his computations, Dr. Dillman testified:

> The fourth thing that I have to do is that I have to also allow for the fact that we are talking about monies that won't all be received in the first year. Some would be received in the second year and the third year and the third year all the way up to the twenty-third year. . . . But I have to represent that flow of twenty-three years as one hunk of money. . . . **We call it present day value.**

(SF 516-17; emphasis added). However, Dr. Dillman also pointed out the historic trend of inflation in all segments of the economy, including wages is such that " . . . essentially, they do offset completely" (SF 518; Px 17). That he had made the allowance is clearly brought out in Railroad counsel's cross examination:

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[5] *See also, Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 889 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981) (Failure to instruct on non-taxability of FELA award was harmless error).

> Q [by Railroad's attorney]: And at the end of it, even though you would have been withdrawing $50,000.00 every year, you would still have a million dollars when it is all said and done?
>
> A [by Professor Dillman]: Sure.
>
> Q: That is why we have to discount to present value when we are talking about future earnings?
>
> A: I already have.
>
> Q: . . . Your assumptions that you based your calculations on say that because wages in your opinion will grow over the course of 22 years, just as fast as interest rates, or will shrink just as fast as interest rates, either way, then the discount – the discount value is zero?
>
> A: Effective net discount would be zero, yes.
>
> Q: In other words, you are predicting wage rates to grow or stay even with interest rates?
>
> A: After taxes, yes.

(SF 548). Dr. Dillman placed a minimum discounted present value of $838,000 on Plaintiff's lost wages (Px 17). He testified:

> Q: [by Plaintiff's counsel]: Now, is the way you figure the $838,497 the way, in your opinion, the most reasonable, if he goes to school and gets the engineering degree in four years?
>
> A: [by Dr. Dillman]: Yes.

(SF 527).

The principal thrust of the Railroad's petition is that Texas' "harmless error" rule is legally impermissible and conflicts with a federally-mandated "reversible error" standard applied in FELA cases. Having set up this false premise, the Railroad made, in its briefs in the Texas courts, the profound declaration *"That is the end of the inquiry."* Unfortunately for the Railroad, the case law, statutes and rules show it is *not* the end of the matter. The Railroad ignores the federal courts' own rules of harmless error as declared in Fed. R. Civ. P. 61 and 28 U.S.C. §2111 (1982). The federal statute provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

It is clear that the judgment in this case did not work any injustice, much less a substantial one, to the rights of the parties. Were this case tried under the dictates of Fed. R. Civ. P. 61 and the federal harmless error statute, it is clear that the judgment would not be disturbed, even though the present value instruction was not given.

In applying the harmless error rules, the federal courts have consistently ignored errors in instructions if it is apparent that the error would not have changed the result. *See, e.g., Lusby v. T.G. & Y. Stores, Inc.*, 796 F.2d 1307, 1310 (10th Cir. 1986), *cert. denied sub nom. City of Lawton Oklahoma v. Lusby*, 479 U.S. 884; *Circle J. Dairy, Inc. v. A.O. Smith Harvestore Products, Inc.*, 790 F.2d 694, 699 (8th Cir. 1986); *Spano v. Kominklijke Rotterdamsche Lloyd*, 472 F.2d 33, 35 (2d Cir. 1973); *Smith & Co. v. Russek*, 212 F.2d 338 (5th Cir. 1954).

While there is no precise definition of "harmless error" under the federal cases, in making such a determination the court necessarily must look to the circumstances of the case and whether there is substantial evidence to support the verdict. *Kotteakos v. United States,* 328 U.S. 750 (1946). As this Court observed, "to weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum." 328 U.S. at 765. In this case, looking at the pleadings, uncontradicted evidence and the verdict, the error in omitting a present value instruction was harmless and did not affect the substantial rights of the Railroad.

The Railroad cites a number of cases from federal and state court jurisdictions in which the present value instruction was upheld. However, these cases are distinguishable for two critical facts: (1) here, the Railroad offered *no evidence* to contradict the Plaintiff's calculation of future lost wages and (2) here, the Railroad offered *no evidence* of any discount rate to be applied by the jury in its analysis. Nevertheless, the end product was an overall 70% *reduction* in the award for future lost income. Application of a 3% present value discount, without allowance for inflation against Professor Dillman's already discounted projected net lifetime loss of $838,000, yields an additional reduction of only $206,714, for a net reduced verdict of $631,286. Obviously, the jury's net overall reduction of 70% greatly exceeded any effective discount the Railroad could have expected based simply on a present value analysis.

In those cases which must nearly coincide with the state of the evidence in this case, the courts trying FELA

cases have reached a similar result. For example, in *Miller v. Union Pacific R.R. Co.*, 900 F.2d 223, 226 (10th Cir. 1990) the court held:

> The law in the federal courts, however, is that when, as in this case, 'neither party provides competent evidence of the inflation rate or the discount rate, the district court [or the jury] must make a lump sum award that is not adjusted for either factor.' *Alma v. Manufacturers Hanover Trust Co.*, 684 F.2d 622, 626 9th Cir. 1982). The district court did not err in refusing the tendered [present value] instruction.

900 F.2d at 226. In a footnote to the quoted material, the court held that the refusal to give the present value instruction is not affected by the requirements of *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330 (1988). The court observed that *Monessen* deals with the substantive right to the present value instruction but *not* with the *distinct question* of whether an evidentiary foundation must be laid to support such an instruction in a particular case.

In the *Alma* case, cited by the *Miller* court, the Ninth Circuit held that "where the plaintiff adequately proves the inflation factor but the defendant fails to establish the discount rate, the lump sum must be adjusted only for inflation." 684 F.2d at 626. *Accord, Brady v. Burlington Northern R.R. Co.*, 752 P.2d 592 (Colo. App. 1988) (trial court should not have instructed jury to adjust to present value award for future losses without competent evidence of how adjustment procedure worked and what was a fair adjustment).

The case of *Bonura v. Sea Land Serv., Inc.*, 505 F.2d 665, 668-69 (5th Cir. 1974) does not support the Railroad's position in this case. In *Bonura*, the defendant carrier did not complain of the substance of the trial court's instruction. Rather, the issue focused on whether the plaintiff had introduced adequate evidence to support the jury's calculation of the future damage award. Similarly, *Blue v. Western Ry. of Alabama*, 469 F.2d 487 (5th Cir. 1972) adds nothing to the analysis. In *Blue*, a present value instruction was given which erroneously mandated a discount rate greatly in excess of the appropriate rate, taking into account the fluctuation of interest rates over the long term. 469 F.2d at 497. *See also, Heater v. Chesapeake & Ohio Ry. Co.*, 497 F.2d 1243, 1249-50 (7th Cir. 1974), *cert. denied*, 419 U.S. 1013 (1974). In *Heater*, a present value instruction was given and the issue was whether it was error to omit additional instructions explaining an appropriate method of computation. In this case, the court's instruction (Tr. 28) to find that "sum of money, if any, *if now paid in cash*, [which] would fairly and reasonably compensate Donald Conant for his injuries and damages . . . " could be considered the practical equivalent of such a minimal present value instruction.

B. The Railroad offered no evidence as to what discount rate should be applied.

The Railroad offered no contradictory testimony, expert or otherwise regarding Conant's lost wages. The railroad did not offer proof of a suggested discount rate. Under Texas law, the Railroad's failure to offer any evidence of what the discount rate ought to have been is not,

in itself, preclusive of the jury's ability to apply a discount factor. *Missouri Pacific R.R. Co. v. Kimbrell,* 334 S.W.2d 283, 286 (Tex. 1960). Yet, on the facts of this case, the result is still the same because the actual amount found by the jury – $255,000 (Tr. 29) – is a figure deeply discounted from the *only* evidence offered for their consideration. In the absence of contrary evidence, it is difficult to envision the jury's making an informed present value calculation.

C. The evidence was uncontradicted that the effect of discounting to present value was offset by the effects of future cost of living increases.

The "total offset" approach used by Professor Dillman is neither illogical nor unprecedented. *See, e.g., Lucas v. United States,* 807 F.2d 414, 422 (5th Cir. 1986) (medical malpractice action under Federal Tort Claims Act); *Meader v. United States,* 881 F.2d 1056, 1058-60 (11th Cir. 1989) (also a medical malpractice suit under the FTCA). As in *Lucas,* the failure to introduce evidence controverting the opinion that inflation offsets the discount rate precludes the complaint on appeal. 807 F.2d at 422; *see also, Jones & Laughlin Steel Corp. v. Pfeiffer,* 462 U.S. 523, 550 (1983) (parties may stipulate to offset market rate of interest against inflation); *Howard v. Chesapeake & Ohio Ry. Co.,* 812 F.2d 282, 287 (6th Cir. 1987) (" . . . Although the 'total wash-out' or 'total offset' concept has not been accepted as a mandatory federal rule of decision, it is prominently featured on the menu of economic theories from which courts may currently choose in FELA cases.")

The Railroad also points to *Monessen S.W. Ry. Co. v. Morgan*, 486 U.S. 330 (1988) as support for its contention that the court's failure to instruct the jury on present value was harmful error. *Monessen* is distinguishable from this case because the trial judge there relied on Pennsylvania's mandatory rule of decision in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 583, 421 A.2d 1027, 1038-1039 (1980). *Kaczkowski* instructed the courts of that state to cease discounting future lost earnings to present value because future inflation would be *presumed* equal to future interest rates. The factors would be deemed to offset one another as a matter of law. This court held that such an *affirmative* instruction to the jury to *disregard* present value was error. *Monessen* does not address the situation where, as here, the court's instructions are silent on present value, but the result is the jury award was less than one-third of the amount shown by the uncontradicted evidence to be the Plaintiff's future lost earnings (SF 516-518, 527; Px 17). Nevertheless, the Railroad implicitly speculates that the error was harmful because the jury would likely have awarded a lesser amount had it been instructed to apply a discount factor. There is no evidentiary support in this record for any such speculation.

The bottom line of this case is that the jury award effectively represents a discount rate *far greater* than prevailing rates or the nominal 1% – 3% "below market" rates suggested by the case of *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 527 (1983).[6] The uncontradicted testimony was that the impact on Conant's future earnings

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[6] *Jones & Laughlin* was an action under the Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. § 904. The Supreme Court held that the district court erred in applying

was at least a net loss of $838,497 (SF 526). The jury awarded $255,000 (Tr. 29). In truth, the jury bought the Railroad's argument that Conant should have gone back to college (SF 1106-1109) and awarded him four years' loss of income plus the estimated costs of the college education.[7] The total award of $255,000 reflects pretty closely an award of four years' lost wages plus college

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Pennsylvania's "total offset" rule of the *Kaczkowski* case as a **mandatory** federal rule of decision. 462 U.S. at 551. However, the *Jones & Laughlin* opinion does not automatically condemn a total offset as a **result** if it is reached through "sound economic argument." After a lengthy discussion of the factors influencing the discount/inflation analysis, the Supreme Court said "having surveyed the multitude of options available, we will do no more than is necessary to resolve the case before us." 462 U.S. at 547. Noting that specific forecasts of future price inflation may be unreliable but that the discount rate is equally an arbitrary factor, the court held "the average accident trial should not be converted into a graduate seminar on economic forecasting" citing, *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30, 39 (2d Cir. 1980). While noting that courts adopting a below market discount rate or "real interest rate" of between 1% and 3% would not be reversed, the Supreme Court did not go so far as to mandate a specific rate or range of rates. In the final analysis, a fair reading of *Jones & Laughlin*, and subsequent cases shows that (i) the parties should try to agree in advance on a stipulated rate but (ii) if they cannot, any rate proved by the evidence may be acceptable if supported by rational economic argument and (iii) a **resulting** total offset is not unacceptable or irrational as long as (iv) it is not the mandatory rule of decision.

[7] According to the Railroad's expert, Terry Van der Molen, the estimated costs for Conant's college education would range from a low of $33,000 to a high of $68,000 and the probable amount would be $48,000 (SF 1026-27). Conant's lost wages during the four years of college would be a little over $50,000 per year (SF 742) exclusive of fringe benefits.

costs. Had the jury simply used the *Jones & Laughlin* approach and applied a 1% – 3% discount to the entire $838,000 estimated by Professor Dillman, the lost earnings award would have been in excess of $500,000. The error, if any, in failing to instruct the jury to discount future earnings to present value was harmless on the facts of this case.

Conclusion and Prayer

For the reasons stated, Respondent Donald R. Conant prays that the United States Supreme Court deny Petitioner's petition for writ of certiorari.

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